

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR07-1041

TEDDY LEE CLARKS,
APPELLANT

V.

STATE OF ARKANSAS,
APPELLEE

Opinion Delivered SEPTEMBER 10, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR206-4245]

HONORABLE JOHN LANGSTON,
JUDGE,

AFFIRMED

SAM BIRD, Judge

Teddy Lee Clarks was found guilty in a jury trial on two counts of rape, and he was sentenced to consecutive terms of twenty years' imprisonment. Clarks raises one point on appeal, contending that the trial court abused its discretion by refusing to grant a continuance for the purpose of securing independent DNA testing and analysis. We hold that the trial court did not abuse its discretion in this matter; therefore, the conviction is affirmed.

Clarks's counsel made no motions at an omnibus hearing conducted on March 9, 2007, a month before the date set for trial. On the day before trial, his counsel asked to be relieved. The trial court granted the motion and appointed new counsel, who informed the court that Clarks apparently had motions he would like to have addressed. Substituted counsel's request for another omnibus hearing was denied, but a continuance was granted, and trial was set for May 31, 2007.

On the date of trial in May, defense counsel requested another continuance because

Clarks, contrary to counsel's advice, was "adamant" about wanting his own DNA test. Counsel told the court that he had "no reason to believe there's anything wrong" with the testing already done, that he did not desire the test Clarks was requesting, and that Clarks was willing to pay for it himself if necessary. The State responded that there had been ample time for appellant to obtain testing additional to what had been done the previous August, before his arrest and omnibus hearing. Defense counsel, asked by the court why other testing had not occurred, stated:

Mr. Davis was his counsel until April of this year, represented him at Omnibus. . . . The assumption I can make is that . . . Mr. Clarks told Mr. Davis he didn't have the money to pay for the DNA test. I don't know, Your Honor, because the first time Mr. Clarks came in to my office, . . . the first thing he requested was a DNA test. . . .

Your Honor, I talked to different people in my office and was given, and discussed it with other people, and they advised that he . . . not get another DNA test done. That was the decision, not just my opinion, but other attorneys in my office.

The position we took [was] that it was not worth getting another one done. I told him that. I will tell you based on his letter that is correct. . . . That is correct that he wrote me that letter. . . .

He has told me that he wants the DNA. He's willing to pay for it out of his own pocket. He'll do whatever he has to do to get it. Even though I do not believe that it's the correct thing to do.

The trial court denied the motion for continuance. After the jury was selected, the court convened the parties in chambers to address a letter found on the court's desk that morning and written by appellant the previous day.¹ Appellant orally addressed the court

¹No letter appears in the record before us. Appellant's statement of the case includes the following note: "The letter referred to was mentioned by Defense Counsel in her preliminary Motion for continuance, and is referenced at this stage. The letter was never introduced or otherwise made a part of the Record."

about obtaining his own DNA test and different counsel. He said that he ran out of money when he had his first attorney; that his appointed counsel told him she would try to get funds for DNA testing; that she returned his many calls only two days before the trial, which was “not adequate defense”; and that he could have sold blood or washed cars to help get the test. The court denied appellant’s motion to change counsel, noting that both it and the previously granted motion to change counsel were made one day before scheduled trial dates.

The case immediately proceeded to trial. Witnesses for the State testified that Clarks committed the following crimes against his step-granddaughter, W.J., when she lived with him and her grandmother (Clarks’s wife) before and after the sixth grade. Clarks touched W.J.’s “privacy part” with his hand the first time she lived with them, and he “stuffed his privacy part” inside hers when she moved in again at age eleven or twelve. This act happened more than twenty times and stopped only when she became pregnant. She named Clarks as the man who caused the pregnancy, which was medically terminated.

The State’s expert witness testified that DNA tests showed a 99.9% probability that Clarks was the father. Clarks testified in his own defense: he denied ever touching W.J., asked the jury to believe him over the DNA evidence, stated that he did not agree with the test results, and said that he would have gotten another test if he had enough money.

The circuit court’s denial of a continuance for time to consult an expert is reviewed for an abuse of discretion. *See Navarro v. State*, 371 Ark. 179, __ S.W.3d __ (2007) (rejecting an argument that the circuit court abused its discretion in denying the appellant a continuance to consult an expert about autopsy photographs allegedly given the defense one working day

before trial). An appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance, but must also show prejudice amounting to a denial of justice. *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002). The denial of a continuance that would deprive an accused of the chance to have an independent review of DNA analysis will be closely examined, but reversal is not necessary where the accused does not provide the name of an expert or the hope of procuring one in the near future. *See Hill v. State*, 321 Ark. 354, 902 S.W.2d 229 (1995) (citing *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992)).

Here, Clarks essentially requested an open-ended continuance in order to obtain an unnamed DNA expert. No motions had been made at the omnibus hearing, the first trial date had been rescheduled when his initial counsel was relieved and new counsel was appointed, and the motion for continuance came before the trial court against counsel's advice on the morning of the new trial date. Clarks's victim testified that he performed sexual acts against her, she named him as the man who impregnated her, and the State's expert witness testified that DNA tests showed a 99.9% probability that Clarks was the father. We hold that the circuit court acted well within its discretion in denying the motion.

We note Clarks's assertion that, although there was no discussion of DNA before the trial court until the day of trial, the record suggests that he had been seeking assistance of counsel for just such purposes. He argues that, because he put his trust in his attorneys to comply with his requests for testing, the trial court "could have found" that a continuance should have been granted in the interest of justice. This is not, of course, the standard by

which we review the denial of a motion for a continuance. *See Navarro v. State, supra.* And to the extent that Clarks faults his counsel's performance, this court is not the proper forum for such an appeal. *See Rackley v. State*, 371 Ark. 438, ___ S.W.3d ___ (2007).

Affirmed.

GLADWIN and ROBBINS, JJ., agree.